UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
L.T. BOOKER, J.K. CARBERRY, E.C. PRICE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

WILLIAM C. FAIRLEY
AVIATION MACHINIST'S MATE SECOND CLASS (E-5), U.S. NAVY

NMCCA 200900574
GENERAL COURT-MARTIAL

Sentence Adjudged: 27 August 2008.
Military Judge: CDR Mario DeOliveira, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast, Jacksonville, FL.
Staff Judge Advocate's Recommendation: LCDR F.J. Yuzon, JAGC, USN.
For Appellant: LT Dillon Ambrose, JAGC, USN; LT Ryan Santicola, JAGC, USN.
For Appellee: Maj Jonathan Nelson, USMC.

30 June 2010

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

CARBERRY, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of 2 specifications of aggravated sexual assault, and one specification each of abusive sexual contact and adultery, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The military judge sentenced the appellant to confinement for a period of 9 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the findings and the sentence as adjudged.

The appellant raises the following errors on appeal: (1) that Specification 1 of Additional Charge II, abusive sexual contact, is multiplicious with Specification 2 of Additional Charge II, aggravated sexual assault, and represents an unreasonable multiplication of charges; (2) that trial defense counsel (TDC) were ineffective; (3) that the appellant's military pay was improperly stopped on 9 February 2010, the End of his Active Obligated Service Date; and, (4) that the appellant was subjected to pretrial punishment by being commingled with post-trial prisoners during pretrial confinement.[1]

Multiplicity

The appellant first argues that Specifications 1 and 2 of Additional Charge II are multiplicious because his digital penetration of SMA's vagina actually constituted aggravated sexual assault and is facially duplicative with the penile penetration of SMA during the same encounter. We disagree.

The test to determine whether two offenses are facially duplicative, known as the "elements test," requires us to consider whether each provision of each specification "requires proof of a fact which the other does not." *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F. 2004)(quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

The relevant elements of Article 120(h) (Abusive Sexual Contact) are: (1) that the accused engaged in sexual contact with another person; and (2) that the other person was substantially incapable of communicating unwillingness to engage in the sexual contact or while she was substantially incapable of declining participation in the sexual contact. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) Part IV, ¶ 45b(8)(c).

The relevant elements of Article 120(c) (Aggravated Sexual Assault) are: (1) that the accused engaged in a sexual act with another person, who is of any age; and (2) the other person was substantially incapable of communicating unwillingness to engage in the sexual contact or while she was substantially incapable of declining participation in the sexual act. *Id.* at ¶ 45b(3)(c).

During the providence inquiry into Specification 1, the appellant admitted that he engaged in sexual contact with SMA by digitally touching her genitalia while she was asleep or so intoxicated she could neither consent nor decline participation in the sexual contact. Specifically, the appellant admitted that he "took my two fingers and, after I spit on them, I massaged and then I put my fingers inside her to make it moist." Record at 354. During the providence inquiry into Specification 2, the appellant admitted that he later inserted his penis into SMA's

[1] The appellant raises the assignments of error pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).

vagina while she was asleep or so intoxicated she could neither consent nor decline participation in the sexual act.

Although the two charged offenses occurred at the same location within a short time of one another, the evidence establishes that the appellant committed two distinct offenses. Specification 1 requires proof of facts not required by Specification 2, and *vice versa*. Specifically, Specification 1 requires proof of digital touching of the genitalia and Specification 2 requires proof of inserting appellant's penis into SMA's vulva. Given the distinctions between the elements of the two specifications, we conclude that they are not multiplicious.

Unreasonable Multiplication of Charges

The appellant next argues that the two offenses represent an unreasonable multiplication of charges. Applying the multi-pronged *Quiroz* test for unreasonable multiplication of charges, we find this averment of error to be without merit. *United States v. Quiroz*, 55 M.J. 334, (C.A.A.F. 2001). We are convinced that the specifications were aimed at two distinctly separate criminal acts, each of which victimized SMA. The charges did not exaggerate or misrepresent the appellant's criminality, nor did they unreasonably increase the appellant's punitive exposure. Finally, the appellant has shown no evidence of prosecutorial overreaching or abuse. Accordingly, we find that Specifications 1 and 2 of Additional Charge II do not represent an unreasonable multiplication of charges and this assignment of error is without merit.

Pretrial Punishment

The appellant avers that he was subjected to pretrial punishment by being commingled with post-trial prisoners during his periods of civilian and military pretrial confinement. We note that the Clay County Sheriff's Office initially investigated the appellant's sexual assault that occurred on 24 October 2008 and detained the appellant until 17 December 2008 when the State Attorney elected not to prosecute the appellant. There is no evidence that the appellant was held by civilian authorities at the behest of the military. Accordingly, in this instance, the circumstances under which the appellant was detained while in the hands of civilian authorities are not cognizable by this court.

We note further that the appellant failed to make a motion for relief stemming from any illegal pretrial punishment. Before receiving the appellant's pleas, the military judge asked if the defense had any motions, and the defense had none. Record at 313. That is significant because if the appellant wanted sentence credit for what he believed was illegal pretrial punishment at the confinement facility, he could have asked for it, as he was not precluded from doing so by the terms of his pretrial agreement. Moreover, later in the court-martial

proceeding the military judge specifically asked whether the defense had "any motion requesting relief for any unlawful punishment or restraint." *Id.* at 386. The assistant defense counsel answered "No". *Id.* The failure to raise a motion for illegal pretrial punishment waives the issue, and finding no plain error, we conclude that the appellant is not entitled to relief. *See United States v. Inong*, 58 M.J. 460, 464 (C.A.A.F. 2003).

Ineffective Assistance of Counsel

The appellant argues that his TDC were ineffective in that they: did not afford him the opportunity to view a videotaped interview of SMA's statement to NCIS and the video footage from inside the bar where SMA had been drinking the evening of the sexual assault; did not object to the trial counsel's use of the term "rape;" failed to discredit SMA's version of events; and, did not afford the appellant the opportunity to personally submit clemency matters.

We review ineffective assistance of counsel claims de novo. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). We analyze claims of ineffective assistance of counsel under the framework established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Davis*, 60 M.J. at 473 (citing *United States v. Quick*, 59 M.J. 383, 387 (C.A.A.F. 2004)). In doing so, the appellant "must surmount a very high hurdle." *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). This is because it is presumed that counsel are competent in the performance of their representational duties. *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000).

Failure to View Videotapes

In support of this assignment of error, the appellant submitted a one page unsworn declaration in which he avers that had he seen the aforementioned videotapes he "... could have been better able to make a decision about whether to plead guilty." Other than making a more informed decision as to his guilty plea, the appellant fails to articulate any prejudice resulting from his not viewing the videotapes, e.g., they contained exculpatory or extenuating evidence. The fact that the appellant did not view all of the evidence against him does not lead us to conclude that his TDC were ineffective. In light of the absence of any

discernible error by TDC or prejudice to the appellant, we conclude that this assignment of error is without merit.

Failure to Discredit SMA

The appellant avers that his TDC were ineffective in failing to discredit SMA by not pointing out her inconsistent statements. The appellant, however, fails to direct this court to any inconsistent matters contained in SMA's affidavit, statement to NCIS, or her Article 32 testimony. Furthermore, assuming that TDC were ineffective in failing to point out inconsistencies in SMA's statements, he fails to articulate how he was prejudiced by counsel's failure to discredit such statements. Accordingly, we find this assignment of error to be without merit.

Failure to Object to Trial Counsel's Use of the Word "Rape"

The appellant argues that his TDC were ineffective because they failed to object to trial counsel's use of the word "rape". We have reviewed the context in which the trial counsel used the word "rape" and note that trial counsel used the word primarily when referring to the "rape kit" that was performed on one of the appellant's victims. Record at 399-400, 434. The word "rape" was used on three other occasions and although its usage was incorrect, its use was neither inflammatory nor prejudicial to the appellant. Furthermore, in light of the context in which the word was used and the forum, military judge alone, TDC's decision not to object to the limited use of the word rape was sound and reasonable. Accordingly, this assignment of error is without merit.

Failure to Afford the Appellant the Opportunity to Personally Submit Clemency Matters

Although the clemency request submitted by TDC on 5 October 2009, included a letter from the appellant dated 12 August 2009, the appellant did not receive a copy of the record of trial until after the convening authority had acted and thus, was unable to submit allegations of error to the CA. In the interest of affording the appellant the opportunity to fully exercise his right to submit matters to the CA, judicial economy, and without deciding that TDC were ineffective, we set aside the CA's action.

We have considered the appellant's remaining assignment of error and found it to be without merit.[2] *United States v. Reed*, 54 M.J. 37, 42 (C.A.A.F. 2000)(citing *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987)).

[2] See paragraph 11 of pretrial agreement and Record at 361-62 in which the appellant affirms his understanding that his pay and allowances will be stopped on 9 February 2010, the date of his End of Active Obligated Service.

Conclusion

The convening authority's action dated 16 October 2009 is set aside. The record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority for new post-trial processing consistent with this opinion.

Senior Judge BOOKER and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court